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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. GARRETT LEE GALLUP, Defendant and Appellant.	C057485 (Super. Ct. No. SF098543A)

Defendant Garrett Lee Gallup strangled Nicole Etheridge and was convicted of first degree murder. He appeals this conviction contending there was insufficient evidence of premeditation and deliberation, the trial court prejudicially erred in refusing to give an instruction on intoxication as it related to premeditation and deliberation, and the court prejudicially erred in failing to instruct on the lesser included offense of involuntary manslaughter. We shall affirm the judgment.

FACTUAL BACKGROUND

Nicole Etheridge worked part time as a waitress at Pizza Plus, a local restaurant owned by defendant's parents, Gail and

Greg Gallup. Defendant also spent some time working at the pizza parlor and met Etheridge there. Etheridge complained to her boyfriend, Brenden Gill, that defendant had made sexual comments to her at work and had touched her inappropriately. As a result of defendant's conduct, she was uncomfortable with him and thought about quitting her job.

By December 14, 2005, Etheridge was apparently comfortable enough with defendant to spend time with him in a group of friends. That night, at about 8:30 or 9:30 p.m., she was at the pizza parlor with her friend, Sindy Plaster, Plaster's boyfriend, Corey Maciel, and defendant. Etheridge and defendant were playing a dice game and drinking. Based on defendant's comments and actions, Maciel believed defendant liked Etheridge and thought she was cute. Defendant was drinking mugs of beer while at the pizza parlor.

At around 10:00 or 10:30 p.m., the quartet decided to leave the pizza parlor and "hang out" at Etheridge's. Etheridge lived at her grandmother's home, in the basement. Although he had been drinking, defendant did not appear drunk at that time. They all drove their own cars to Etheridge's, and defendant brought some beer with him.

Defendant continued drinking beer in Etheridge's basement. Etheridge and defendant also smoked marijuana and used cocaine. At some point in the evening, Plaster warned Etheridge to be careful with defendant, because they were drinking and she knew defendant was interested in Etheridge sexually. Etheridge told

Plaster not to worry because she loved her boyfriend, Brenden Gill. She also told Plaster that defendant would be leaving at the same time Plaster and Maciel left and Etheridge was going to have Gill come over.

Because they were uncomfortable with the drug use, Plaster and Maciel decided to leave around 11:45 p.m. Defendant stayed behind. Plaster thought defendant was under the influence. Maciel did not think defendant was intoxicated at the time he left Etheridge's.

The next morning, Etheridge's grandmother, Louise Mitchell, found Etheridge dead at the bottom of the basement stairs. Her body was "cold as ice" and Mitchell could not lift her.

Etheridge had abrasions on her eyes, nose, mouth and chin and on both knees. There was grass on her stomach, legs, underwear, socks, sweatshirt, and pants and in her hair. The front of her sweatshirt was covered in dirt and her sweatpants were balled up around her right ankle. Based on the scene and the condition of her body, San Joaquin Deputy Sheriff David Oliver opined Etheridge had been involved in a struggle and dragged down the concrete stairs. State Department of Justice Criminalist Elizabeth Schreiber also concluded there had been a struggle.

Defendant had arrived at his sister and brother-in-law's home at around 4:00 a.m. on December 15. He looked as though he had been "partying" and smelled of alcohol. Defendant went to sleep on the couch. Defendant's mother and sister later learned

Etheridge had been killed. Knowing he had been with Etheridge the prior evening, they questioned him about her death. He claimed he did not know what happened and was generally evasive.

Defendant's mother took defendant to the sheriff's office later that day. Defendant acknowledged he was the last to see Etheridge alive. Following his brother-in-law's advice, defendant told deputies he believed he was responsible for Etheridge's death. He then asked for an attorney and invoked his right to remain silent.

Defendant was arrested. He had an abrasion on the back of his head, and red marks on his hip, buttocks, chest and neck. Both Etheridge's and defendant's blood was found on his jeans.

An autopsy was performed, and it was determined Etheridge died from asphyxiation due to manual strangulation. It was not certain whether she died as a result of the strangulation itself or as a result of the broken hyoid bone. She had abrasions and bruises on her neck which were consistent with finger marks. There were scratches along with those bruises which were consistent with fingernail gouges. Her neck organs and deep muscles in the neck were also bruised from extreme pressure. Her hyoid bone was fractured. There was a bite mark on her tongue, hemorrhages of the thyroid gland, and petechiae of the eyes. Petechiae are pinpoint hemorrhages in the eyes caused by a "combination of pressure, as the person is trying to breathe and fighting against the strangulation, and the lack of oxygen." The strangulation could have been done from the back, front or

side, but it was done with bare hands. The bruises on her body occurred either close to the time of death or postmortem.

Once Etheridge's hyoid bone was broken it would have taken approximately five to eight minutes for her to die. To fracture the hyoid bone takes a great deal of force and pressure, more than could be done accidentally or by a child. If Etheridge had been strangled for as much as three minutes, without the hyoid bone being broken, and then the assailant had let her go, she probably would have survived.

The amount of time it takes for someone to die from being strangled varies depending on the amount of force and pressure used to strangle the person. Using the least amount of force, it could take 30 minutes to an hour to kill a person. If the pressure is increased, such that the air tube is closed off, the person would lose consciousness in about three minutes and have irreversible brain damage in about six to eight minutes. With the greatest degree of force, the person would lose consciousness in about eight seconds and have irreversible brain damage in about three to four minutes.

Forensic pathologist Dr. Robert Lawrence opined Etheridge died from the mid level of force and pressure, with her air tube being cut off. Lawrence also testified that if the hyoid bone was broken at the first moment the airway was cut off, it would take five to eight minutes for a person to die. The person would be lying there "gurgling and gasping and struggling for air and then going unconscious." However, the hyoid being

broken does not immediately mean that the person will die, if the victim receives quick medical attention.

Dr. Lawrence testified that Etheridge had "quite a bit" of cocaine in her system.[1] The cocaine would have improved her ability to fight off an attack. She had a blood-alcohol level of 0.09 percent, or probably three to four drinks. The alcohol would have had a sedating effect, the opposite of the cocaine. However, the cocaine was in the higher levels, so ultimately she would have been more stimulated than sedated.

PROCEDURAL HISTORY

Defendant was charged with first degree murder. (Pen. Code, § 187.)[2] Trial lasted approximately eight days.

Defendant proposed the court instruct the jury on voluntary intoxication. The court denied the request, noting that, while there was evidence defendant had been drinking and smoking marijuana, there was no "actual evidence of intoxication[,] . . . no evidence of any effect that it had on defendant."

Upon denying that request, the court asked defense counsel if, in light of its decision, counsel was "still requesting a voluntary manslaughter lesser." Counsel answered "No." The court asked if counsel was requesting "any other lesser."

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[1] Dr. Lawrence described the amount of cocaine as "not enough to kill her, but enough to make her under the influence." He also disagreed with Dr. Bolduc, the doctor who performed the autopsy, that the amount was a lethal amount.

[2] Undesignated statutory references are to the Penal Code.

Counsel answered "No." The court then asked if there were "[a]ny other instructions we need to discuss, then, other than what we discussed this morning?" Defense counsel answered, "I don't believe so."

Defendant was convicted of first degree murder and sentenced to an indeterminate term of 25 years to life.

DISCUSSION

I. Evidence of Premeditation and Deliberation

Defendant contends there was insufficient evidence he "planned to kill [Etheridge] or killed in a reflective manner." In other words, he claims there was insufficient evidence of premeditation and deliberation.

"In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we 'examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, disapproved on a different ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151; *People v. Rundle* was disapproved on a different ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*).) "We do not reweigh evidence or reevaluate a witness's credibility."

(*Guerra*, at p. 1129.) Reversal of a first degree murder conviction for insufficiency of the evidence to establish premeditation and deliberation "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

In making his argument, defendant relies upon *People v. Anderson* (1968) 70 Cal.2d 15, in which the California Supreme Court established the following test for deciding whether sufficient evidence supports a finding of premeditation and deliberation: "(1) planning activity; (2) motive (established by a prior relationship and/or conduct with the victim); and (3) manner of killing. [Citations.] '[T]his court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3).' (*Anderson*, [at p. 27].)" (*People v. Sanchez* (1995) 12 Cal.4th 1, 32, disapproved on a different ground in *Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

"In identifying categories of evidence bearing on premeditation and deliberation, *Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation. . . . The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they

exclusive." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 (*Perez*).) Nevertheless, although the *Anderson* factors do not have to be present in any "'special combination'" or accorded a "'particular weight'" (*People v. Sanchez*, *supra*, 12 Cal.4th at p. 33), the factors do guide our determination of whether the murder occurred as a "result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." (*Perez*, *supra*, 2 Cal.4th at p. 1125; *People v. Hovarter* (2008) 44 Cal.4th 983, 1019 (*Hovarter*).)

Here, as defendant notes and the People concede, there was no evidence of planning. There is, however, evidence of motive and manner of killing, which supports a finding of premeditation and deliberation.

Defendant's past relationship and conduct with Etheridge provided evidence of motive. Defendant's sexual interest in Etheridge was no secret. At work, he had made sexual comments to her and touched her inappropriately. She had told Gill of defendant's previous conduct toward her and her discomfort with that conduct. On the night of the murder, defendant made it clear he was interested in Etheridge, thought she was cute, and wanted to "get some from [her]" that night. His interest in her was sufficiently plain that her friend sought to caution her and was concerned about leaving them together, because of what might happen sexually between them. By the same token, the evidence supported the conclusion that Etheridge would have rejected any amorous advances from defendant. She had a boyfriend, Gill, and

assured Plaster there was no need for concern because she loved Gill. She planned for defendant to leave at the same time as Plaster and Maciel, and Gill would come over. The evidence of defendant's past interactions with Etheridge and conduct toward her provided some evidence of motive.

Further, the manner of strangulation and extent of Etheridge's injuries support a finding of deliberation and premeditation. There was evidence at the scene of a struggle. Defendant had a scratch on the back of his head and other marks on his body also suggesting he had been engaged in a struggle. Both his blood and Etheridge's blood were on defendant's jeans. Etheridge had bruises and abrasions all over her body, the injuries were sustained near the time of death and postmortem. Her clothes were dirty and grass-stained. There were scratches on her neck consistent with fingernail gouges. She had numerous hemorrhages in her eyes, caused from a combination of pressure from trying to breathe, fighting and lack of oxygen. Dr. Lawrence testified as to the various time frames of death from strangulation. At a minimum, it would have taken Etheridge five to eight minutes to die. Eight minutes during which she would be gurgling, gasping and struggling for air and during which defendant did not call for help or medical attention for her. Most likely, according to Lawrence, defendant was strangling Etheridge for between three and eight minutes.[3] A strangulation

[3] We reject defendant's contention that Dr. Lawrence's conclusion has no evidentiary value and cannot be relied upon.

that takes three to eight minutes is strong evidence of premeditation and deliberation.

Defendant's behavior after he killed Etheridge also provided evidence the jury could consider as indicating that he acted with premeditation and deliberation, and not impulsively. (See *Perez*, *supra*, 2 Cal.4th at p. 1128.) Whether he was strangling her for three to eight minutes or she was gurgling and gasping for air for eight minutes, defendant did not seek any medical attention or help for Etheridge. He went to his sister's home, and other than appearing as though he had been partying, there was nothing amiss in his behavior. He went to sleep on the couch. The next day, when his sister and mother asked him what had happened that night, he told them he did not know or did not respond at all. Defendant's actions, and lack of actions, showed that he was not overwrought with emotion and supported a conclusion that he had premeditated and deliberated the murder.

Defendant relies on *People v. Rowland* (1982) 134 Cal.App.3d 1 to support his argument that the manner of killing, strangulation, is not sufficient evidence to support a finding of premeditation and deliberation. In *Rowland*, the defendant met a woman at a party and took her home. (*Id.* at p. 6.)

Lawrence's conclusion was based on his experience and the injuries to Etheridge's body: the bruising and abrasions (including to her neck organs and deep muscles), the hemorrhages in her eyes, and the evidence of a struggle.

However, the defendant's live-in girlfriend was also home. (*Ibid.*) Defendant told his girlfriend some friends were staying over, and that she should stay in her bedroom. (*Ibid.*) Defendant took the woman into the next bedroom and strangled her with an electrical cord. (*Id.* at pp. 6-7.) We concluded there was no evidence of motive, other than an intent to prevent the victim from making any sounds and revealing her presence in the home, as there was no evidence of any prior relationship between defendant and the victim. We also held that the manner of killing, ligature strangulation of the victim with an electrical cord, did not suggest that the defendant had taken "'thoughtful measures' to procure a weapon for use against the victim." (*Id.* at p. 8.)

This case is distinct from *Rowland*. First, unlike in *Rowland*, in this case there was evidence of previous interactions between defendant and Etheridge. There was evidence he was sexually attracted to her and had behaved inappropriately towards her in the past, in ways which had made her uncomfortable. There was also evidence she would reject any sexual advances by defendant. Thus, in this case there was evidence of motive. Furthermore, in *Rowland* there was no evidence about the length of time it took to kill the victim or the extent of her injuries. Here, there was evidence of the extensive injuries suffered by Etheridge, which took time to inflict and there was evidence the killing took at least five to eight minutes. The evidence regarding the amount of time the

killing took is an important distinction between this case and *Rowland*, because premeditation and deliberation can occur after the strangulation begins, as long as it occurs before the final amount of pressure is applied that actually kills the victim.

The California Supreme Court has repeatedly held that the longer it takes to strangle a victim, the more this suggests deliberation. (See, e.g., *Hovarter*, *supra*, 44 Cal.4th at pp. 1019-1020 [victim strangled for between five and eight minutes]; *People v. Stitely* (2005) 35 Cal.4th 514, 544 [manner of killing suggested premeditation when pathologist testified that lethal pressure had been applied to the victim's neck for a "'long'" time and instead of easing the pressure on the victim's neck, the defendant "used multiple means of strangulation, namely, manual choking sufficient to break the thyroid cartilage, use of a choke hold sufficient to break the cricoid cartilage, and application of a ligature sufficient to damage the neck"]; *People v. Davis* (1995) 10 Cal.4th 463, 510 [strangulation of sexual assault victim for up to five minutes suggested deliberate plan to kill her].) When the method used to kill the victim takes time, the defendant has ample opportunity to consider the deadly consequences of those actions, and therefore the method of killing may support a finding of premeditation and deliberation. Here, manual strangulation that takes between three and eight minutes is a "prolonged manner of taking a person's life, which requires an offender to apply constant force to the neck of the victim,

affords ample time for the offender to consider the nature of his deadly act. 'A rational finder of fact could infer that [this manner of killing] demonstrated a deliberate plan to kill her.'" (*Hovarter*, *supra*, 44 Cal.4th at p. 1020, quoting *Davis*, *supra*, 10 Cal.4th at p. 510.) Accordingly, there was substantial evidence supporting the finding of premeditation and deliberation.

II. Voluntary Intoxication Instruction

Defendant next contends the trial court prejudicially erred in refusing to "give an instruction relating intoxication to premeditation and deliberation." We are not persuaded.

Defendant requested the jury be instructed on voluntary intoxication[4] of defendant relative to a homicide. In a criminal case, a trial court must instruct on general principles of law relevant to the issues raised by the evidence, even absent a request for such instruction from the parties. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) A defendant is entitled, upon request, to an instruction on voluntary intoxication only where there is substantial evidence of defendant's voluntary intoxication and that the intoxication affected defendant's ability to meet an element of the charged offense, such as

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[4] Defendant actually proposed the voluntary intoxication instruction in CALCRIM No. 3426; however, the trial court noted that the appropriate voluntary intoxication instruction relative to premeditation and deliberation is CALCRIM No. 625. As the court considered the correct jury instruction, our discussion will proceed relative to CALCRIM No. 625.

premeditation, deliberation or specific intent. (§ 22, subd. (b); *People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on other grounds in *Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; *People v. Williams* (1997) 16 Cal.4th 635, 677; *People v. Saille* (1991) 54 Cal.3d 1103, 1120.) There must be "evidence from which a reasonable jury could conclude defendant's mental capacity was so reduced or impaired as to negate the required criminal intent." (*People v. Marshall* (1996) 13 Cal.4th 799, 848.)

Here, there was evidence defendant ingested an unknown number of beers, smoked an unknown quantity of marijuana, and used an unknown amount of cocaine. There was also evidence that it takes "a lot" to get defendant drunk, as he has a high tolerance for alcohol. Defendant did not appear drunk at 8:30 p.m. at the pizza parlor. Specifically, between 8:30 p.m. and 10:30 p.m. defendant drank some mugs of beer at the pizza parlor. When the group left the pizza parlor, defendant did not appear drunk. Defendant continued drinking beer in Etheridge's basement. He smoked some marijuana from a pipe. By the time Plaster and Maciel left, around 11:30 p.m., Plaster thought defendant might have been drunk, but Maciel did not think he was. Over four hours later, defendant's brother-in-law thought defendant looked as though he had been partying all night and he smelled of alcohol.

Evidence that defendant smelled of alcohol some unknown amount of time after the killing had little evidentiary value in

establishing his level of intoxication at the time of the killing. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1379 (*Turk*).) At best, the evidence shows defendant might have been drunk at 11:30 p.m. There is no evidence as to the effect of any such intoxication on defendant's mental state at the time of the killing. No witness testified that the beer or marijuana had any impact on defendant's mental state or actions. There was no forensic evidence establishing defendant's level of impairment, or even whether he had actually ingested cocaine. There was no evidence as to how much alcohol he actually drank or marijuana he smoked. There was no expert testimony about the likely effects of alcohol and marijuana consumption on defendant's ability to premeditate and deliberate. There was no evidence these substances substantially impaired or affected defendant at all. "[M]erely showing that the defendant consumed some alcohol prior to commission of the crime without showing the effect of the alcohol on him is not sufficient to warrant an instruction on [voluntary intoxication]." (*People v. Carr* (1972) 8 Cal.3d 287, 294; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1241.) The same rules apply to the consumption of marijuana. (*Carr*, at p. 295.) "[I]n the absence of evidence indicating the quantity of [alcohol and] marijuana consumed or additional evidence reflecting the state of defendant's mind, a jury could not reasonably have concluded, in the light of the evidence in this case, that defendant by reason of intoxication did not premeditate or adequately deliberate. Accordingly, the refusal of the offered instruction was not error." (*Ibid.*; see

also *People v. Ramirez* (1990) 50 Cal.3d 1158, 1181; *People v. Bandhauer* (1967) 66 Cal.2d 524, 528.)

III. Involuntary Manslaughter Instruction

Defendant's final contention is that the trial court prejudicially erred in failing to give a sua sponte instruction on the lesser included offense of involuntary manslaughter. We find no error.

Involuntary manslaughter is ordinarily a lesser included offense of murder. (*People v. Ochoa* (1998) 19 Cal.4th 353, 422 (*Ochoa*).) "One commits involuntary manslaughter either by committing 'an unlawful act, not amounting to a felony' or by committing 'a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' (§ 192, subd. (b).) If the evidence presents a material issue of whether a killing was committed without malice, and if there is substantial evidence the defendant committed involuntary manslaughter, failing to instruct on involuntary manslaughter would violate the defendant's constitutional right to have the jury determine every material issue." (*People v. Cook* (2006) 39 Cal.4th 566, 596; *People v. Abilez* (2007) 41 Cal.4th 472, 515.)

Unless voluntary intoxication results in unconsciousness, there is no duty to instruct on involuntary manslaughter. (*Turk*, *supra*, 164 Cal.App.4th at pp. 1378-1381.)

"Although unconsciousness in this context '"can exist . . . where the subject physically acts in fact but is not, at the

time, conscious of acting"' [citation], the record in the present case fails to reflect substantial evidence that defendant's ingestion of cocaine and alcohol rendered him unconscious." (*People v. Heard* (2003) 31 Cal.4th 946, 981.)

Defendant's argument rests on the underlying premise that there was "substantial evidence suggesting that [defendant] was intoxicated at the time of the crime. Based on this evidence the jury could reasonably conclude that [defendant] was too intoxicated to form the requisite malice for a murder conviction. Instead, an involuntary manslaughter conviction was entirely proper."

As discussed fully above, we disagree there was substantial evidence that defendant was intoxicated at the time of the crime. There certainly was not substantial evidence that defendant's intoxication rose to the level of unconsciousness. There was no evidence defendant appeared to "lack awareness of his actions" as a result of intoxication. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 418.) There was no evidence of the amount of alcohol, marijuana or cocaine that defendant ingested prior to the killing. There was no testimony about any symptoms of intoxication defendant was exhibiting, other than being talkative and upbeat. There was no expert testimony that any such symptoms indicated unconsciousness. Evidence from one witness that defendant might have been drunk or intoxicated, by itself, is not evidence of unconsciousness. (See *Turk*, *supra*, 164 Cal.App.4th at pp. 1379-1380.) In short, there was simply

no evidence from which the jury could have concluded that defendant was either too intoxicated to understand what he was doing or was unconscious of acting. (*Halvorsen*, *supra*, 42 Cal.4th at pp. 418-419; *Ochoa*, *supra*, 19 Cal.4th at p. 424.) Thus, the trial court had no duty to instruct on involuntary manslaughter.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

SCOTLAND, P. J.

HULL, J.